15-1263, 15-1269

In The United States Court of Appeals
For The Federal Circuit

DOUGLAS DYNAMICS, LLC,

Plaintiff-Cross Appellant,

v.

BUYERS PRODUCTS COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin in Case No. 3:09-cv-00261-wmc, Judge William M. Conley

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NON-CONFIDENTIAL PRINCIPAL AND RESPONSE BRIEF OF DOUGLAS DYNAMICS, LLC

Aaron T. Olejniczak (principal attorney)
Edward R. Williams
Christopher R. Liro
Andrus Intellectual Property Law, LLP
100 East Wisconsin Avenue, Suite 1100
Milwaukee, WI 53202
Phone: 414-271-7590
Fax: 414-271-5770
Email: aarono@andruslaw.com

Counsel for Plaintiff-Cross Appellant

Dated: May 14, 2015

CERTIFICATE OF INTEREST

Counsel for the Plaintiff-Cross Appellant, Douglas Dynamics, LLC, certifies the following:

1. The full name of every party or amicus represented by me is: Douglas Dynamics, L.L.C.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Douglas Dynamics, L.L.C. is a publically owned corporation. J.P. Morgan Investment Management, Inc. is a publically held company that owns 10% or more of the stock of Douglas Dynamics, L.L.C.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: Aaron T. Olejniczak, Christopher R. Liro and Edward R. Williams, Andrus Intellectual Property Law, LLP.

Dated: May 14, 2015

/s/Aaron T. Olejniczak
Aaron T. Olejniczak
Attorney for Plaintiff-Cross Appellant
Douglas Dynamics, LLC

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STATEMENT REGARDING CONFIDENTIAL MATERIAL

Pursuant to FCR 28(d)(1)(A), confidential material is indicated in the confidential version of this Brief by yellow highlighting. The confidential material so indicated has been redacted from the non-confidential version of this Brief by blackout. The redactions are required by the Stipulated Protective Order issued by the trial court.

Material has been redacted for two reasons: the material relates to Douglas's market share information ("market share") or the material could be used to derive Douglas's or Buyers' sales, cost or profit information ("sales information"). The material redacted on pages 64, 65, 66, 67, and 68 reflects sales information; the material redacted from pages 49, 50, and 51 reflects market share.

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STATEMENT OF RELATED CASES

This action was previously before this Court in *Douglas Dynamics, LLC v. Buyers Products Company*, Case Nos. 2011-1291, 2012-1046, 2012-1057, 2012-1087, 2012-1088, decided May 21, 2013, by a panel consisting of Chief Judge Rader and Circuit Judges Newman and Mayer. The opinion was published at 717 F.3d 1336 (Fed. Cir. 2013) ("*Douglas I*").

JURISDICTIONAL STATEMENT

This action arises under the Patent Laws of the United States. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338. Jurisdiction in this Court is under 28 U.S.C. § 1295(a)(1). The district court entered an amended final judgment on January 5, 2015. JA1. Douglas filed its timely notice of appeal on January 15, 2015. JA11954.

COUNTER STATEMENT OF APPEAL ISSUES

Issue 1. Whether this Court's previous ruling implicitly affirmed summary judgment of ***non-infringemen*t** of dependent claims 47, 48, 49, and 51, while simultaneously directing entry of judgment of ***infringement*** of independent claim 45, when the sole basis of the district court's ruling on the dependent claims was their dependence from the independent claim.

Issue 2. Whether the district court properly granted summary judgment of no invalidity, when the meaning of *support frame* in claim 45 is reasonably certain to one of ordinary skill, and when Buyers failed to identify evidence that would allow a reasonable jury to conclude that any of the claims are anticipated or obvious.

Issue 3. Whether the district court abused its discretion in admitting the testimony of Douglas's damages expert, and in not ordering a new trial based on its damages instructions.

Issue 4. Whether the district court erred when it concluded that the ruling of this Court in the prior appeal that Buyers' ***accused products meet every limitation*** of claim 45 compelled the result that Buyers was liable for infringement damages based on sales of all the accused products.

STATEMENT OF CROSS APPEAL ISSUES

Issue 5. Whether the district court abused its discretion when it awarded pre-judgment interest at a rate below the prime rate.

Issue 6. Whether the district court abused its discretion when it selected the rate and base for awarding supplemental royalties for products found to infringe at the 2010 trial, in light of this Court's ruling in the prior appeal.

STATEMENT OF THE CASE

Plaintiff Douglas Dynamics, L.L.C. ("Douglas") filed this suit against defendant Buyers Products Company ("Buyers") on April 29, 2009, originally alleging infringement of five U.S. patents: Re. 35,700 (the '700 patent), 5,353,530 (the '530 patent), 6,944,978 (the '978 patent), 4,999,935 (the '935 patent), and 5,420,480 (the'480 patent). JA199-208.

Following discovery and claim construction, Douglas moved for summary judgment that the claims of the '700 patent were not invalid. JA739-40. Douglas explained that the term *support frame* in claim 45 was not indefinite, that claim 45 was not anticipated by U.S. 4,187,624 to Blau ("Blau"), and that dependent claims 47, 48, 49 and 51 were not obvious in light of Blau in combination with other references. JA758-68.

Buyers filed a cross motion for summary judgment on these same validity issues. JA2950-51. Despite the reissue file history's explanation of the term *support frame*, Buyers' argued that the term was indefinite because: 1) it was not used verbatim in the specification; 2) the definitions of the word "frame" from different dictionaries were not identical; and 3) inventor testimony on claim construction purportedly supported its position. JA2980-83. With respect to anticipation and obviousness, Buyers argued that Blau's "bell crank assembly" was a *support frame*. JA2983-87.

Douglas also moved for summary judgment that Buyers infringed the ’700 patent, ’530 patent, ’978 patent and ’480 patent. JA2829-30. On the ’700 patent, Douglas’s motion asserted that, to the extent assembly of the entire claimed apparatus was performed by an end-user rather than by Buyers or an agent such as a dealer/distributor, Buyers was nonetheless liable as an indirect infringer. JA2859-67; JA2873. In opposition however, Buyers’ ***sole*** non-infringement argument for claim 45 of the ’700 patent was that the accused products lacked an A-frame connected to a support frame. JA4179-80. Buyers abandoned all other defenses, including whether any other limitation was absent; that its products had non-infringing uses; or that it lacked the intent or knowledge required to support induced and contributory infringement.[1]

On October 1, 2010, the district court entered an Order granting Douglas summary judgment of infringement of the ’530 and ’978 patents, denying Douglas summary judgment on the ’700 and ’480 patents, and granting Buyers summary judgment of non-infringement of the ’700 and ’480 patents. JA5115-94; *Douglas Dynamics, LLC v. Buyers Products Company*, 747 F. Supp. 2d 1063 (W.D. Wis. 2010). On October 6, 2010, the district court entered an Order granting Douglas summary judgment of no invalidity of the ’978 and ’480 patents (and denying

[1] Buyers also moved for partial summary judgment of non-infringement of the ’700 patent on June 7, 2010, and again failed to raise any indirect infringement arguments. JA3487-3488.

Buyers' cross motions), denying Buyers summary judgment of invalidity of the '530 patent because of genuine issues of material fact, and denying both the Douglas and Buyers cross motions concerning validity of the '700 patent as moot in light of the court's previous grant of summary judgment of non-infringement. JA5301-17; *Douglas Dynamics, LLC v. Buyers Products Company*, 745 F. Supp. 2d 876 (W.D. Wis. 2010).

Prior to the October 2010 trial, Buyers successfully limited Douglas's damages case based on the judgment of non-infringement for the'700 patent. Relying on testimony from Douglas's damages expert Mr. Bero, Buyers sought and received a ruling from the district court that Mr. Bero could not offer lost profits damages, and could only offer a royalty rate limited between 1% and 2% per patent. JA5399-401. Accordingly, during the 2010 trial Buyers' counsel and its damages expert repeatedly emphasized the pioneering nature of the '700 patent, and the fact that the '700 patent was commercially more important and valuable. *See, e.g.*, JA6067; JA6155-56; JA6193-95; JA6247-48.

A jury trial commenced on October 12, 2010, resulting in a first verdict on October 14, 2010 finding that Buyers failed to establish invalidity of the '530 patent and that Douglas failed to establish infringement of the '935 patent. JA5416-18. The trial continued, resulting in a second verdict on October 15, 2010 awarding damages to Douglas in the amount of $509,124.00 for Buyers' infringement of the ’530 patent and $509,124.00 for Buyers’ infringement of ’978 patent. JA5430.

Douglas subsequently filed a motion for permanent injunction. JA6273-74. On February 28, 2011, the district court denied the permanent injunction, and set a deadline for the parties to reach a licensing agreement for Buyers’ use of the infringed patents or to file separate positions on a reasonable ongoing royalty. JA6786-97. The parties did not reach agreement, and on September 22, 2011, the district court set a royalty rate of 6.225% for ongoing sales of products infringing the ’530 and ’978 patents, characterized as “slightly less than double the pre-verdict award of 3.3%.” JA6881-87.

After entry of an amended judgment, Douglas appealed, resulting in this Court’s 2013 decision in *Douglas I*. That decision directed entry of a permanent injunction, entry of summary judgment of infringement of claim 45 of the ’700 patent, and vacated the district court’s post-trial royalty award. 717 F.3d at 1339. More specifically, with respect to infringement of the ’700 patent, this Court held that:

> In sum, the correct construction of the term “connected to” in claim 45 is not limited to direct connections. The record shows that Buyers’s SnowDogg snowplow assemblies include an A-frame connected to a support frame with the support frame then connected to a mounting frame. *See Douglas Dynamics*, 747 F. Supp. 2d. at 1092. Buyers has not presented any other arguments against infringement of claim 45. Accordingly, ***this court finds the accused products meet every limitation of claim 45 as properly construed***. Therefore, this court

> reverses the grant of summary judgment of noninfringment and directs the district court to enter summary judgment of infringement in favor of Douglas.

Id. at 1343 (emphasis added). With respect to the ongoing royalty rate for the ’530 and ’978 patents, this Court explained its vacatur of the royalty rate:

> First, the district court abused its discretion by applying the infamous 25% rule of thumb, which this court held in *Uniloc* was fundamentally flawed. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011). Second, the district court clearly erred by limiting the ongoing royalty rate based on Buyers’s profit margins. This court has held that an infringer’s net profit margin is not the ceiling by which a reasonable royalty is capped. *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1338 (Fed. Cir. 2004). The infringer’s selling price can be raised if necessary to accommodate a higher royalty rate, and indeed, requiring the infringer to do so may be the only way to adequately compensate the patentee for the use of its technology. Thus, the district court clearly erred by ensuring the ongoing royalty rate it awarded would “leave some room for profit” by Buyers at its current prices.

Id. at 1346.

Following an unsuccessful petition for rehearing filed by Buyers, this Court’s mandate issued in *Douglas I*, and the case remanded to the district court. The district court issued an Order directing the parties to file initial and response briefs to address “any open issues they believe remain to be addressed by this court upon remand by the Federal Circuit.” JA6924. Both parties filed initial briefs and response briefs. JA6925-38; JA7044-61; JA7337-49; JA7478-98.

With respect to the ’700 patent, Douglas asserted that infringement of claims dependent on claim 45 should be addressed on the existing briefing (JA7052-59), while Buyers' initial brief stated: "Buyers contends that only claim 45 . . . remains for adjudication. The claim's validity and, if the claim is found valid, the appropriate amount of damages, remain to be decided." JA6925. Buyers argued that the district court "should find that its authority to consider further issues regarding the '700 patent ***is limited to*** determining the validity of claim 45 and (if the claim is valid) related damages." JA6931 (emphasis added). Its response brief maintained these positions. JA7478-98.

Buyers did not indicate that indirect infringement was an issue remaining to be addressed, or that it was entitled to file a supplemental brief to address any intervening case law. JA6925-38; JA7478-98. Moreover, in response to Douglas's request in its initial brief that summary judgment be decided on the existing briefing and record (JA7047-48; JA7058-59), Buyers asserted that supplemental briefing ***only on invalidity*** was appropriate to address the Federal Circuit's claim construction and new prior art references. JA7482; JA7490; JA7497. Buyers failed to request further briefing on infringement, failed to identify any intervening case law relevant to infringement, and did not indicate that indirect infringement was an open issue to be decided.

The district court ruled on November 5, 2013 that it would consider infringement of the ***dependent*** claims only and that it would decide the pending summary judgment motions on the existing briefing. JA37; JA39-41. In rejecting

Buyers' assertion that the claims depending from claim 45 were no longer part of the case, the district court observed that its previous finding of non-infringement of claim 45 "formed the sole basis for the court's decision that its *dependent* claims were also not infringed as a matter of law." JA39. It concluded:

> In reversing this court's finding of non-infringement on claim 45, the Federal Circuit necessarily vacated the finding of non-infringement on its dependent claims as well. It would defy logic to hold that the Federal Circuit *implicitly affirmed* the non-infringement of the dependent claims when the only grounds for doing so would have been the judgment it *explicitly reversed*.

JA40 (emphasis in original).

Buyers' counsel then devised a new defense: that this Court's mandate in *Douglas I* was limited to *de minimis* direct infringement by Buyers when Buyers itself attached the snowplow assembly to a vehicle, and that the district court now needed to address indirect infringement on remand. Buyers first raised this argument that it may not be liable for damages for all of the sales of its infringing snowplow assembly products on December 31, 2013, when it sought leave to file a supplemental brief opposing Douglas's motion for summary judgment of infringement. JA7601-03. In doing so, Buyers misleadingly argued that "Buyers seeks leave to file the Supplemental Brief because the law regarding the scienter element of indirect infringement has significantly changed." JA7601.

The district court rejected this request and observed that Buyers did not previously argue that the vehicle limitation was absent, and this Court's ruling that "the accused products meet every limitation of claim 45 as properly construed" compelled the conclusion that, for law of the case purposes, this Court necessary ruled that the vehicle limitation ***was*** met. JA47-48. The district court properly observed that the "new" Supreme Court case that Buyers relied on, *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. __, 131 S. Ct. 2060 (2011), was decided on May 31, 2011, ***before*** the *Douglas I* proceedings. The district court also observed that allowing this new defense would be unlikely to change the outcome on the merits, because the snowplow assemblies have no purpose other than for use on a vehicle. Otherwise, "the plow apparatus is nothing but a heavy, expensive and ungainly law[n] decoration." JA49.

On March 13, 2014, the district court ruled on the pending summary judgment motions on the '700 patent. JA51-85. With respect to validity of claim 45 and the dependent claims, the court considered Buyers' arguments on indefiniteness, anticipation, and obviousness, and concluded that the claims were definite and that no reasonable jury could find the claims anticipated or obviousness in light of Buyers' offered evidence. JA55-66; JA74-84. The district court further ruled that Douglas was entitled to summary judgment of infringement of the dependent claims—the natural result given that Buyers had not separately argued any bases of non-infringement. JA66-74.

Despite these rulings, as the April trial approached, Buyers filed a motion *in limine* on March 14, taking the disingenuous position that it "is not clear to Buyers" from the court's February 13, 2014 (JA43-50) and March 13, 2014 (JA51-85) orders "whether the Court will require Douglas to provide proof at trial of the *mens rea* necessary to obtain damages for indirect infringement." JA8124-25. Buyers mischaracterized the record then, as it does now, asserting that the "Federal Circuit has found that when Buyers' plows are used on a customer's truck, the plow and truck together have all the limitations present in Claim 45 of the '700 patent." JA8125. In opposition, Douglas again pointed out that ***this was not the holding in Douglas I***, and that the district court already granted Douglas's motion for summary judgment of infringement. JA84.

The district court again rejected Buyers' attempt to inject its new defense:

> While Buyers has presented and preserved a clever legal argument, it can go nowhere at this stage of the lawsuit for legal, practical and factual reasons. The Federal Circuit held that Buyers' products contain each and every limitation of claim 45 as properly construed, without addressing the *mens rea* of indirect or contributory infringement at all. It is logically inconsistent to say that the Federal Circuit found that Buyers' products directly infringed the '700 patent, but that Douglas cannot now prove up damages based on those same products. In any event, there is no alternative use that could be made of the infringing snowplow assemblies (other than perhaps very expensive and unattractive lawn ornaments or outdoor sculpture). Certainly, the evidence is that these assemblies are bought and sold for one reason—to attach to vehicles as contemplated for direct infringement of the '700 patent.

JA101.

Similarly, Buyers attempted to inject its new defense into the 2014 trial through proposed jury instructions and verdict form. JA8441-44; JA8463-67. Douglas again responded that infringement was not an issue for trial, and that the only issue to be decided was the magnitude of damages. JA8947-48; JA8962-63.

The case proceeded to trial beginning April 15, 2014, with the sole issue presented to the jury being the damages owed Douglas for Buyers' infringement of the '700 patent. *See, e.g.*, JA9350. Douglas's primary damages theory was that the jury should award lost profits on 50% of Buyers sales, reflecting Douglas's market share, and a reasonable royalty on the other 50% of sales. Alternatively, Douglas sought damages based entirely on a reasonable royalty if the jury concluded that lost profits were not available. Core issues at trial included the commercial significance of the '700 patent and the competition between Douglas and Buyers.

After Douglas closed its case on the second day of the trial, Buyers filed a motion for judgment as a matter of law, once again raising the direct/indirect infringement issue. JA9612; JA10253-54. The district court denied the motion, noting: "I've already addressed the direct and indirect infringement argument. I appreciate that Counsel wants to preserve that. . . ." JA9612. The district court came back to the issue during Buyers' presentation of its case, raising the possibility of putting on additional evidence and revising the verdict form to address a related point. JA9688-91. After Buyers completed its last witness, the issue was addressed, and Douglas explained that it did not want to reopen the infringement question at that late stage. JA9751-62. The district court clarified that Douglas was not waiving any arguments, and that it understood that the issue of its interpretation of the *Douglas I* mandate would be taken up by this Court on appeal if necessary. JA9758-62.

Based on the evidence presented, the jury returned a general verdict awarding Douglas $9,750,000 in damages, with no specificity as to the basis for the amount. JA10283.

Thereafter, Buyers filed motions to amend the judgment and for judgment as a matter of law and/or a new trial. JA10354-56; JA10374-76. Douglas also filed a post-trial motion, seeking an amendment of the judgment including an award of pre-judgment interest and an award of royalties for the sales after the 2010 trial that infringed the ’530 and ’978 patents (one of the issues remanded by *Douglas I*). JA10297-98.

The district court denied Buyers’ motions and granted in part and denied in part Douglas’s motions. JA4-35. The district court summarily rejected Buyers’ direct/indirect argument, noting that it had raised the same argument no fewer than three times previously. JA13-14. The district court also once again took up the indefiniteness question in light of the June 2014 decision in *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014), ruling that it had not previously reached inconsistent conclusions and that the term *support frame* was not indefinite under the standard articulated in *Nautilus*. JA5-8. Both parties filed notices of appeal (JA11950-54), and this appeal followed.

SUMMARY OF THE ARGUMENT

In its 2013 *Douglas I* decision, this Court held that Buyers' "accused products meet every limitation of claim 45" of Douglas's '700 patent, and directed the district court to enter summary judgment of infringement in favor of Douglas. This put Buyers in a dilemma because it had placed the weight of its entire non-infringement case on the single claim construction argument rejected in *Douglas I*. Buyers offered no additional defenses to Douglas's assertions of direct and indirect infringement of claim 45, and did not offer any independent infringement defenses for the dependent claims that Douglas asserted. Buyers only presented a weak and poorly supported invalidity defense. And in advance of the 2010 trial, it successfully argued that Douglas's damages for the '530 and '978 patents could not include lost profits, and could support only a small royalty, because the truly commercially valuable technology was embodied in a patent that, at that time, the district court ruled was not infringed—the '700 patent.

Following remand, the district court ruled in advance of the April 2014 trial that each sale by Buyers of its accused SnowDogg snowplow assemblies infringed claim 45 and the asserted dependent claims as a matter of law, and that Buyers' invalidity defenses on these claims also failed as a matter of law. At the 2014 trial, Douglas established its entitlement to damages, and the jury returned a verdict of

$9,750,000. Buyers now attacks both the liability rulings and the admission of evidence supporting the damages verdict. Its attacks, however, all fail.

First, the district court properly addressed and entered judgment of infringement of the asserted claims dependent on claim 45. *Douglas I* focused on the construction of a limitation within independent claim 45, ruling that the district court's construction was incorrect. This single construction formed the entire basis for the district court's prior non-infringement ruling, not only for claim 45 but for the asserted dependent claims as well. Because the underlying claim construction was vacated, the non-infringement ruling based on that claim construction also was necessarily vacated. Since Buyers offered no further defenses, the district court properly granted summary judgment of infringement on remand.

Second, the district court properly determined that the mandate in *Douglas I* compelled an award of damages based on all of Buyers' sales of the accused products. This Court in *Douglas I* held that "the accused products meet every limitation of claim 45" after observing that "Buyers has not presented any other arguments against infringement of claim 45." The district court followed this ruling, which was itself compelled by the arguments and evidence presented by Buyers on summary judgment and on appeal. This Court did not rule that Buyers infringed claim 45 only when it mounted the accused products on a truck, or that Buyers' customers directly infringed when they mounted the accused products.

The district court properly rejected Buyers' untimely and futile efforts to re-litigate liability based on indirect infringement.

Third, the district court properly granted summary judgment that Buyers failed to establish or present substantial evidence that claim 45 or any of the asserted dependent claims were invalid as indefinite, anticipated, or obvious. Blau cannot anticipate claim 45 because it does not disclose the claimed *support frame*, and Buyers does not even appeal the separate bases the district court provided in ruling that Buyers could not show obviousness of the dependent claims. Nor is the term *support frame* indefinite, and the district court did not construe it inconsistently.

Fourth, the district court properly allowed Douglas's expert evidence and properly instructed the jury on damages. While conceding the sufficiency of the evidence to sustain the verdict in light of the district court's legal rulings and instructions, Buyers nonetheless collaterally attacks the admissibility of expert evidence and a related jury instruction. The district court did not abuse its discretion in allowing the evidence, as the opinions were all well grounded both factually and legally. Nor did the district court err by declining to give a jury instruction based on a 130-year-old case that appears in no model instruction and is redundant at best and misleading at worst.

After the 2014 trial, the district court amended the judgment at Douglas's request to include prejudgment interest and to award royalties for sales of snowplow assemblies that infringed the '978 and '530 patents that were sold after the 2010 verdict, an issue remanded by *Douglas I*. The district court, however, committed errors in its rulings that Douglas raises on cross appeal.

Fifth, the district court erred in declining to award prejudgment interest at the prime rate. This issue is controlled by Seventh Circuit law providing that it is an abuse of discretion to award prejudgment interest at less than the prime rate unless there is another statutory rate (which there is not) or if the district court engages in "refined rate setting" (which it did not do). Thus, Douglas is entitled to prejudgment interest at the prime rate.

Sixth, the district court erred in setting both the base and the rate for the post-2010-verdict royalties. The court cut the base in half because it concluded that there was a "risk" of double counting because Douglas "sought" lost profit damages on half of the total sales. But whether the jury actually awarded lost profits is unknown, and a hypothetical risk cannot justify the district court's refusal to grant royalty damages on these sales. Further, while avoiding mentioning the improper factors cited by this Court in *Douglas I* in vacating the prior royalty award, the district court came up with a rate that was only slightly different and that cannot conform to the bases it provided. Here too, the district court abused its discretion.

ARGUMENT

I. Standard of Review

Douglas accepts Buyers' statement of the standards of review. Douglas adds that, with respect to Buyers' jury instruction challenge, a "jury verdict will be set aside, based on erroneous jury instructions, if the movant can establish that those instructions were legally erroneous, and that the errors had prejudicial effect." *Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1363 (Fed. Cir. 2004) (internal quotation omitted). "In reviewing jury instructions, the full trial record and the jury instructions in their entirety must be examined because instructions take on meaning from the context of what happened at trial, including how the parties tried the case and their arguments to the jury." *Id*. (internal quotation omitted).

Douglas further adds that this Court reviews the district court's prejudgment interest award and its award of royalties for certain infringing sales after the 2010 trial for abuse of discretion. *Douglas I*, 717 F.3d at 1346; *Transmatic, Inc. v. Gulton Indus., Inc.*, 180 F.3d 1343, 1347-48 (Fed. Cir. 1999); *P.A. Bergner & Co. v. Bank One, Milwaukee, N.A.*, 140 F.3d 1111, 1123 (7th Cir.1998).

II. The District Court Properly Addressed and Entered Judgment of Infringement of the Dependent Claims

Buyers argues that the district court "over-stepped" this Court's mandate in *Douglas I* when it addressed infringement of dependent claims 47, 48, 49, and 51 on remand. (Buyers Br. at 38.) In Buyers' distorted view, because the opinion in

Douglas I did not specifically address the dependent claims, this Court implicitly affirmed non-infringement of the dependent claims. Buyers' argument is contrary to the record and defies logic, as the district court observed. JA40.

A. *Douglas I* Left Open Infringement of the Dependent Claims

Douglas appealed summary judgment of non-infringement of the dependent claims in *Douglas I*. Douglas's Notice of Appeal and its appeal brief in *Douglas I* demonstrate that it appealed the judgment of non-infringement of the '700 patent as a whole, including the judgment of non-infringement of the dependent claims. Douglas's appeal brief ***defined*** the relevant issue on appeal as:

> Whether the district court erred in denying Douglas' motion for summary judgment of infringement, and granting Buyers' motion for summary judgment of non-infringement, of the '700 patent by misconstruing the claim phrase "wherein the A-frame and the support frame are connected to the mounting frame . . ." in independent claim 45.

JA7084. Thus, while *Douglas I* did not ***reverse*** and enter judgment of infringement for the dependent claims (as it did with claim 45), it necessarily ***vacated*** the previous judgment of non-infringement of the dependent claims. JA40-41.

Although the identified error was the construction of language ***within*** independent claim 45, this language, pursuant to 35 U.S.C. § 112(d), is present not only in claim 45 but also is incorporated by law into the dependent claims as well. Buyers incorrectly attempts to recast the identified error as, for example, "granting Buyers' motion for summary judgment of non-infringement of claim 45 of the

’700 patent.” But Douglas’s explicit statement identified the error as the ***entire*** ruling on infringement ***based on*** the ***construction*** of language in independent claim 45.

“[I]n some cases issues not explicitly addressed by an appellate court may nonetheless be decided by necessary implication.” *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1478 (Fed. Cir. 1998). Buyers ignores the “necessary implication” rule as well as the tenet that “both the letter and the spirit of the mandate must be considered” when interpreting its scope. *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999) (citing *Quern v. Jordan*, 440 U.S. 332, 347 n.1 (1979)). *Engel* holds that “an issue that falls within the scope of the judgment appealed from but is not raised by the appellant in the opening brief is necessarily waived. Unless remanded by this court, all issues within the scope of the appealed judgment are deemed incorporated within the mandate and thus are precluded from further adjudication.” 166 F.3d at 1383. Here, Douglas ***did*** appeal the judgment that no claims of the ’700 patent were infringed, and ***did*** raise the issue of whether portions of that judgment were based on an erroneous claim construction of language in claim 45. This Court agreed in *Douglas I* that the claim construction was erroneous, and so necessarily decided the issue of non-infringement of the dependent claims.

It is not relevant that the *Douglas I* opinion did not separately discuss the dependent claims. The error, and the rise and fall of the non-infringement judgment for claim 45 and its dependent claims, related ***only*** to the construction of words within independent claim 45. JA5161-62. There were no other issues on appeal relating to claim construction or other rulings that related only to the dependent claims, because there were no such rulings—indeed, Buyers had abandoned all other bases for non-infringement.

Buyers also seeks to exploit the holding in *Douglas I* reversing summary judgment as to claim 45 without mentioning the dependent claims. However, only on claim 45was the judgment "reversed"—this Court changed the judgment from non-infringement to infringement. The reversal did not flow automatically from the claim construction ruling, because a party appealing entry of summary judgment does not need to show entitlement to judgment as a matter of law. *See, e.g., Vivid Techs., Inc. v. Am. Science & Eng'g, Inc.*, 200 F.3d 795, 806-07 (Fed. Cir. 1999). Reversal on infringement—ordering entry of a contrary judgment of infringement—is another step, where the burden on the appellant ***increases*** from requiring a showing of a fact dispute or a legal error to further showing that, under the correct legal standards, there is no issue of fact and so it is entitled to a contrary judgment as a matter of law. *See, e.g., Cross Med. Prods. v. Medtronic Sofamor*

Danek, Inc., 424 F.3d 1293, 1302 (Fed. Cir. 2005); *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1344 (Fed. Cir. 2001).

The district court did not previously evaluate whether or not the additional limitations of the dependent claims were present in Buyers' products, because its ruling on the dependent claims was based only on the fact that they depended from claim 45. JA5162. Thus, Douglas did not and could not seek an infringement judgment on the dependent claims in *Douglas I*. What was not decided by necessary implication, and so remained open on remand, was whether the ***additional*** limitations recited within the dependent claims are present in Buyers' products. This means that the limitations of the dependent claims presented open issues, *Exxon Chem. Patents*, 137 F.3d at 1478, not that the rulings of non-infringement were affirmed or left undisturbed.[2]

B. The District Court Properly Granted Summary Judgment of Infringement of the Dependent Claims

On remand, Douglas renewed its motion for summary judgment of infringement of the dependent claims. JA7058-59. As required, Douglas's summary judgment motion set forth undisputed evidence that the dependent limitations were present in the accused products. JA2873; JA2023-27. Buyers'

[2] Buyers also asserts that Douglas should have sought rehearing or clarification of *Douglas I*. This Court's standard practice is ***not*** to make such clarifying rulings. *Exxon*, 137 F.3d at 1479; *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 950 (Fed. Cir. 1997). In any event, Douglas was not obliged to ask this Court to correct or clarify *Douglas I* because there was nothing to "correct."

non-infringement position on those claims, however, was limited to the assertion that they cannot be infringed because claim 45 was not infringed, an assumption negated by *Douglas I*. JA7058 (citing JA3547, 3673-75).

The district court assessed the summary judgment record, appropriately determined that there were no disputed material facts, and determined that the dependent claims were infringed as a matter of law. JA68-74. On appeal, Buyers assigns no error to this analysis, arguing only that the district court was precluded from doing so in the first place. (Buyers Br. at 38-39.)

III. The District Court Properly Determined that Douglas was Entitled to Damages Based on All Sales of the Accused Products

A. *Douglas I* and the Summary Judgment Ruling Established Entitlement to Damages on All Sales

Buyers also attacks the district court's ruling that the *Douglas I* mandate compelled an award of damages based on ***all*** sales of the accused products. Buyers' scattershot argument, occurring in Section IV and other various places within its brief, comes down to this: Although this Court in *Douglas I* directed entry of judgment of infringement of Claim 45, that mandate was limited to the handful of instances where Buyers itself used its accused product on a truck, but did not reach indirect infringement associated with use by Buyers' customers. However, the *Douglas I* mandate clearly ruled that ***the accused products meet every limitation of claim 45*** based on the summary judgment record and appellate record. Thus, each sale by Buyers is an act of infringement for which Douglas is entitled to damages. Buyers' arguments about the truck limitation, scienter, and direct/indirect infringement are incorrect, moot, and untimely.

Douglas I establishes Buyers' liability for infringing claim 45 of the '700 patent for ***all*** of its snowplow sales, whether directly as a matter of acts committed by it or its agents, or indirectly. Buyers' arguments turn on what it portrays as "undisputed," that it does not sell a "vehicle having a frame member and a bumper." (Buyers Br. at 54); *see also* JA13. But Buyers failed to argue this point on summary judgment before the district court or during *Douglas I*. What it characterizes as deficiencies in Douglas's case are not deficiencies at all, but the natural result of the litigation strategy that Buyers pursued throughout the case.

In *Douglas I,* this Court, clearly aware that claim 45 recited "a vehicle having a frame member and a bumper," *Douglas I*, 717 F.3d at 1340, held:

> ***Buyers has not presented any other arguments against infringement of claim 45*** [*i.e.*, other than the argument that it lacked an A-frame connected to a support frame]. Accordingly, this court finds ***the accused products meet every limitation of claim 45 as properly construed***. Therefore, this court reverses the grant of summary judgment of noninfringement and ***directs the district court to enter summary judgment of infringement*** in favor of Douglas.

Id. at 1343 (emphasis added). As the district court explained, "the Federal Circuit found direct infringement of claim 45, which includes the limitation 'a vehicle having a frame member and a bumper.' . . . To find direct infringement, the

Federal Circuit necessarily decided that the limitation was met as to Buyers products." JA48.

During *Douglas I*, Buyers did not argue that it or its agents did not install the plows onto vehicles. JA7898; JA7917-18; JA7928-40. Buyers did not argue that any claim limitation was absent under Douglas's proposed construction. *Id*. Buyers did not argue that it did not directly infringe when final assembly was performed by an independent end-user, let alone by its dealers. *Id*. It did not argue that it lacked any necessary intent or knowledge to support a ruling of either induced or contributory infringement, or that proof of indirect infringement was relevant to Douglas's request for entry of judgment of infringement of claim 45. *Id*. It did not argue that the Federal Circuit should consider *Global-Tech*, which issued more than a year before. *Id*.[3]

Buyers' decision not to raise these arguments on appeal was entirely consistent with (and limited by) its summary judgment positions. Douglas's motion seeking summary judgment of infringement asserted that, to the extent assembly of the entire claimed apparatus was performed by an end-user, Buyers was nonetheless liable as an indirect infringer. JA2860-63. In Buyers' summary judgment opposition brief, however, the ***sole non-infringement argument*** for

[3] Buyers did not address this Court's ruling that the accused products meet every limitation of claim 45 in its rehearing petition. JA7957-78.

claim 45 was that the accused products lacked an A-frame connected to a support frame, the position rejected by this Court in *Douglas I*. JA4179-80.

Buyers did not argue that, even if that limitation were present, it did not sell vehicles, that it or its agents did not install the snowplow assemblies onto vehicles, that its products had non-infringing uses, or that it lacked the intent or knowledge required to support induced and contributory infringement, despite the fact that it was required to raise and substantiate all of its defenses in opposition to Douglas's summary judgment motion. Under Seventh Circuit law, summary judgment is the "'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003) (citation omitted). Nor does the fact that Douglas bore the burden on infringement give Buyers a free pass. "Summary judgment law 'does not permit a nonmovant defendant to delay pointing out claimed flaws in the plaintiff's *prima facie* case until an appeal is under way.'" *C & N Corp. v. Kane*, 756 F.3d 1024, 1026 (7th Cir. 2014) (quoting *Resolution Trust Corp. v. Juergens*, 965 F.2d 149, 153 (7th Cir. 1992).

Thus, the record supporting Douglas's request to the Federal Circuit to direct entry of judgment of infringement of claim 45 for ***all*** of Buyers snowplow sales included Douglas's ***unrebutted*** arguments and evidence that Buyers also was liable as an indirect infringer.

Then, in its March 13, 2014 Order, the district court granted Douglas's motion for summary judgment of infringement of the dependent claims. JA66-74. Douglas's motion, again, encompassed ***both*** direct and indirect infringement by Buyers, and sought judgment that ***each*** sale by Buyers was an infringement. JA2859-63.

B. Douglas Did Not Need to Address Indirect Infringement at Trial

Buyers' discussion of scienter and other indirect infringement evidence at the 2014 trial is completely irrelevant—infringement was a decided issue. The district court's February 13, 2014 Order ruled that Buyers' indirect infringement arguments were moot in light of this Court's ruling that all limitations were met in the accused devices, and the district court later granted Douglas's motion for summary judgment of the dependent claims, on the basis that this Court had rejected Buyers' sole infringement defense. JA50; JA67. Thus, the district court instructed the jury that, "Before this trial, the Court determined that defendant Buyers Products Company's snowplow assemblies infringe claims 45, 47, 48, 49, and 51 of plaintiff Douglas Dynamics' United States patent RE35,700." JA9362. The district court further explained: "Your job is to determine the proper amount of damages adequate to compensate Douglas only for the infringement of claims 45, 47, 48, 49, and 51 of the 700 patent of which you will hear more." JA9362-63.

Accordingly, the starting point of Douglas's damages case at trial and the opinions of its expert Mr. Bero was simple: each sale of a SnowDogg vehicle-mounted snowplow assembly by Buyers is an act of infringement to which Douglas is entitled to receive compensation. As Mr. Bero explained, "Douglas's infringement claims stem from Buyers making, using, selling, offering for sale and/or importing its SnowDogg line of snowplows." JA4700.

Indirect infringement unquestionably was not part of the 2014 trial. JA9612. It certainly could not have been any more clear after Buyers' repeated attempts to advance the issue—including the district court's rejection of Buyers' proposed jury instructions and verdict form—that indirect infringement or any aspect of infringement liability was not being addressed. Moreover, as detailed above, there is no disconnect between the damages evidence and the infringement evidence. Douglas's damages theories are ***independent*** of whether any infringing sale is an act of direct or indirect infringement, and Mr. Bero's report made clear that he did not form and was not offering opinions on the infringement of the Douglas patents. JA4700.

Thus, Douglas's evidence established the magnitude of damages owed to Douglas with the understanding that each and every snowplow sale by Buyers is an act of infringement. Since the district court, based on *Douglas I,* ruled that each and every sale by Buyers ***is*** an act of infringement, Douglas's damages case at trial directly engaged the question for the jury. Whether Douglas quantified damages for some hypothetical infringement scenario, such as Buyers' own internal use of its own plows, was moot and not relevant. The fact that the district court revisited the issue at the eleventh hour and asked whether Douglas wished to expand the trial as a backstop against the potential that it had misinterpreted *Douglas I* did not change its prior rulings or put any evidentiary burden on Douglas, as is evident from the district court's post-trial order. JA13-14. Nor did testimony from Buyers' witness that Buyers allegedly lacked intent have any relevance or place any burden on Douglas.

C. Buyers' Indirect Infringement Argument is Legally Flawed

Even if indirect infringement were at issue, Buyers' arguments based on *Global-Tech* do not hold up because of its knowledge of the'700 patent and the utter lack of non-infringing uses for its snowplow assembly. Buyers concedes that, "[a]t issue in *Global-Tech* was the alleged infringer's claim that it did not know about the patent and, therefore, could not have intended to induce infringement." JA7613. Here, however, ***Buyers plainly did know about the '700 patent.*** JA2862; JA509 at 61:4-17. Thus, what standard to use to find constructive knowledge "that a patent exists," 131 S. Ct. at 2068, has no bearing because the facts establish actual knowledge by Buyers of the'700 patent at the time of the infringement. Further, regardless of *Global-Tech*'s impact on the law of ***induced*** infringement, intent may be ***presumed*** for purposes of ***contributory*** infringement when the accused products have no non-infringing uses. *Ricoh Co. v. Quanta Computer Inc.*, 550 F.3d 1325, 1338 (Fed. Cir. 2008) (" it is entirely appropriate to presume that one who sells a product containing a component that has no substantial noninfringing use in that product does so with the intent that the component will be used to infringe") (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932-33 (2005)). As the district court recognized, and Buyers never disputed, the Buyers snowplow assemblies have no substantial non-infringing uses.

D. Buyers Seeks to Penalize Douglas for Buyers' Litigation Strategy

Finally, there is nothing unfair about this result. Buyers inappropriately suggests that since it does not sell trucks, Douglas needed to address indirect infringement at trial regardless of the prior proceedings. But Buyers' game of "gotcha" makes no sense and is unfair. Douglas's original summary judgment motion demonstrated entitlement to summary judgment that ***all*** sales infringed, either as a matter of direct or indirect infringement. That indirect infringement did not attract more attention—and was not disputed by Buyers on summary judgment—is undoubtedly because any opposition would have been futile. As the district court observed, allowing Buyers to present indirect infringement arguments would be unlikely to change the outcome since the accused products have no use other than use on a vehicle. JA49; JA101.

In defending summary judgment Buyers employed a logical litigation strategy that it would not contest the uncontestable: that its infringing snowplow assemblies have only one use and that, to the extent its own sales agents did not install the plows onto the customers' vehicles (which is standard practice), it instructed its customers to do so. If Buyers contends Douglas needs to show scienter or some other factor, that argument should have been made in response to Douglas's summary judgment motions or on the previous appeal so that Douglas could address it. Instead, Buyers made the decision to rely on a single claim construction argument. While initially successful, the lone argument was rejected in *Douglas I*. Raising a new argument for the first time midway through the remand proceedings following the first appeal in this case was simply too late, and it is fundamentally unfair for Buyers now to argue that Douglas should be penalized for Buyers' tardiness and initial strategic decisions.

IV. The District Court Properly Granted Summary Judgment that Buyers Could Not Prove Invalidity of Claims 45, 47, 48, 49 and 51

A. No Reasonable Jury Could Have Found Claim 45 Anticipated or Claims 47, 48, 49 and 51 Obvious

Claim 45 and the dependent claims are presumed valid, and Buyers has the burden of proving invalidity by clear and convincing evidence. The presumption of validity is especially difficult to overcome here because the Patent Office knew of the disclosure of Blau during prosecution.[4] The ’700 patent, and claim 45 in particular, was also subjected to reissue examination before the current lawsuit and survived reexamination proceedings instituted by Buyers in 2013 unscathed. JA11948-49.

Blau distinguishes between prior art plows having “***frames*** for coupling the blade to the front of a vehicle” and prior art plows having lifting mechanisms without such frames, and decidedly places Blau in the latter category. JA3073 at 1:10 – 2:34 (emphasis added); *see also* JA880 at ¶ 59-61. Those skilled in the art would not consider Blau’s “bell crank assembly 85” lifting mechanism to be in any way comparable to the claimed *support frame*.[5] *See* JA886-88; JA893-94. For example, one advantage of the ’700 patent support frame configuration over Blau’s configuration is that headlamps can be mounted above the snowplow blade without moving with the blade. Thus, blade movement does not interfere with the lighting and does not affect the orientation of the headlamps, *see, e.g.*, JA116-17 at 8:63 – 9:1. In contrast, if headlamps (or other attachments) were attached to Blau’s bell

[4] The Background of the ’700 patent references Blau U.S. Patent No. 4,439,939, which is a continuation-in-part of the Blau ’624 patent.

[5] Douglas’s expert observed that an advantage of the support frame of the ’700 patent is that it requires minimal hydraulic forces in the lift cylinder to raise the snowplow assembly. Conversely, Blau’s bell crank assembly requires a far more substantial force to lift the snowplow assembly because the force angles of the hydraulic cylinders 72. Douglas’s expert evidence showed that Blau’s bell crank assembly does not correspond to the claimed support frame since the manner of transmitting forces is completely different. JA887-88.

crank assembly, the supported attachments would constantly change in orientation as the plow blade moved vertically because of the required movement of the bell crank assembly.

Buyers' only basis for challenging the validity claim 45 on the basis of prior art is that it is anticipated by Blau. Buyers waived all obviousness challenges to claim 45. JA66.

1. Buyers Has Waived Challenge to the District Court's Obviousness Rulings

Buyers falsely argues on appeal that the district court's "finding of validity for the claims dependent on claim 45 was based entirely on the analysis of claim 45," and that the district court "concluded that the additional limitations of the dependent claims were obvious additions to any snow plow." (Buyers Br. at 46-47.) In truth, the district court separately analyzed the dependent claims, the additional references relied on by Buyers, and Buyers' evidence (or lack thereof) in support of combination. JA77-84. Based on this analysis, and ***independent*** of its analysis of whether Blau anticipates claim 45, the district court granted summary judgment to Douglas that Buyers could not prove obviousness of claims 47, 48, 49, and 51. *Id*. Because Buyers has completely ignored these independent bases to support summary judgment, this Court should affirm the district court's rulings that the dependent claims are not obvious.[6]

2. The District Court Properly Ruled that Blau Does Not Disclose the Claimed *Support Frame*

Buyers' anticipation arguments for claim 45 are based entirely on the erroneous premise that the claimed *support frame* reads on the "bell crank assembly" disclosed in Blau. (Buyers Br. at 42.) The district court correctly held on summary judgment that Blau's "bell crank assembly" is not the *support frame* recited in claims 45, 47, 48, 49, and 51, and correctly ruled that the term *support frame* is comparable to and broader than the term *lift frame* used in the specification:

> Thus, the court concludes that the plain and ordinary meaning of "support frame," to a person of ordinary skill in the art, would require it to remain in a fixed position relative to the vehicle, to "support" various assembly components. . . .
>
> In contrast, the bell crank assembly of the [Blau] '624 patent does not—indeed, cannot—play such a role. As discussed above, the bell crank assembly of the '624 patent is *not* fixed to the vehicle. In fact, it functions by *moving* relative to the vehicle: the hydraulic cylinder pushes the L-shaped member of the bell crank assembly forward, which in turn pushes the blade upward to shovel and stack snow. Furthermore, the drawings in the '624 patent show that the bell crank assembly is not located above the blade. (*See* '624 patent, Figure 1.) This means that it cannot support components like lights or spray canopies, since those structures would constantly be shifting as the

[6] The rulings also may be affirmed based on Blau's failure to disclose the limitations of claim 45, as discussed below.

> plow blade moved vertically and indeed would be blocked by the blade itself.

JA64-65 (citing JA894 ¶ 103).

Buyers concedes that Blau does not anticipate claim 45 under the district court's construction of *support frame*. (Buyers Br. at 46.) The district court referred to the Summary of the Invention in the '700 patent's specification when construing the term *support frame* in context of claim 45. JA7-8; JA63-65; *see, e.g.*, JA114 at 3:24-29 ("While the lift frame remains pivotable relative to the A-frame, the lift frame, during plowing, is fixed to the vehicle so that lights and other accessories which may be mounted on the lift frame remain fixed relative to the vehicle during plowing and during stacking of snow.") Thus, the *lift frame* in the specification, and thus the comparable *support frame*, remains fixed to the vehicle during plowing and may support other components of the assembly in addition to the lift load.

The terms used in patent claims are not construed in the abstract, but in the context that the term was presented and used by the patentee, as understood by a person of ordinary skill in the field of the invention on reading the patent documents. *Fenner Invs., Ltd. v. Cellco P'ship*, 778 F.3d 1320, 1322-23 (Fed. Cir. 2015). Thus, a claim receives the meaning it would have to persons in the field of the invention, when read and understood in light of the entire specification and prosecution history. *Id.* (*citing Phillips v. AWH Corp.,* 415 F.3d 1303, 1312–1317

(Fed. Cir. 2005) (*en banc*)). Any explanation, elaboration, or qualification presented by the inventor during patent examination is relevant, for the role of claim construction is to "capture the scope of the actual invention" that is disclosed, described, and patented. *Id.* (citing *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296, 1305 (Fed. Cir. 2011)). Here, the district court correctly reviewed the intrinsic evidence and properly construed the term *support frame*. It is undisputed that Blau does not disclose the limitation under this construction.

Moreover, the dependent claims are consistent with the district court's claim construction, but not the way Buyers applies the claims to Blau. For example, dependent claim 48 requires, in part, "a headlamp connected to said support frame." As noted above, if headlamps were attached to the "bell crank assembly 85" of Blau, the headlamps being supported would constantly be changing in orientation as the plow blade was moved vertically because of the required movement of the bell crank assembly. JA894.

3. Blau Also Does Not Disclose the Claimed *Frame*

In addition, independent of the district court's construction of *support frame,* the court's ruling that no reasonable jury could find that Blau anticipates claim 45 may be upheld on the alternative basis that Blau does not disclose the claimed *frame*.

Buyers' arguments rely on false notions that Blau is clear on this issue and that the district court decided the issue in Buyers' favor. Buyers claims that the "Blau patent itself refers to the bell crank assembly as a frame." (Buyers Br. at 45.) Buyers' citation, however, makes no reference to the bell crank assembly 85 and instead discusses "frame 30," which is an entirely different component.[7] Buyers also falsely states that the district court found that Blau's "bell crank assembly could be called a frame." (Buyers Br. at 45.) But in truth the district court did not address this because it concluded that it was the "wrong question," and the more important question was whether Blau disclosed a *support frame*. JA63.

Though not addressed by the district court, the summary judgment record establishes that no reasonable jury could conclude that Blau's bell crank assembly 85 discloses a *frame* as properly construed. A bell crank is not a rigid structural unit that consists of solid parts such as beams or struts that supports something built around or on top of it. JA886-87. Even Buyers' expert Dr. Prahl admitted that a "bell crank assembly" is a structure entirely different from a frame.[8] Thus, this

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[7] The "bell crank assembly 85" is described as an "assembly" rather than a "frame" throughout Blau, an explicit acknowledgement that the inventor recognized the "bell crank assembly 85" to be an entirely different type of structure from the disclosed "coupling frame 14" and the "plow blade support frame 30." *See* JA3074-75 at 3:45-47, 4:3-6, 5:27-53.

[8] Q: What did you mean when you used the term bell crank?

A: Well, I use that term because that's what I used to use when I made model airplanes, and there was something in there called a bell crank.

Court may affirm the district court's summary judgment of no anticipation on the alternative basis that Blau's bell crank assembly is not the claimed *frame*.

B. The District Court Properly Determined that Claim 45 is Not Invalid as Indefinite

Buyers also asserts that claim 45 and its dependent claims are invalid under §112 because, so it claims, the term *support frame* is indefinite. This argument cannot be reconciled with Buyers' other positions in this litigation. Buyers never attempted to argue to this Court in *Douglas I* that infringement could not be ascertained, and it was clear that the accused products met the *support frame* limitation. As discussed, there this Court concluded that the accused products meet every limitation of claim 45 as properly construed. *Douglas I*, 717 F.3d at 1343. "One cannot logically determine whether an accused product comes within the bounds of a claim of unascertainable scope." *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F. 3d 1313, 1342 (Fed. Cir. 2003). Accordingly, the *Douglas I* mandate precludes arguments of definiteness.

Regardless, the district court properly concluded that the term is not indefinite. This conclusion was established by the intrinsic record, and confirmed

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And it's similar in linkages, the pieces that are linked together here. . . .

Q: So is it your testimony then that a bell crank assembly is a mechanism that allows you to achieve two opposite motions from one motion?
A: Yeah.

JA4068 at 178-179.

by the parties' expert evidence. The district court correctly found *support frame* to be comparable to and broader than the term *lift frame* used in the specification and in other claims. Moreover, this term was specifically addressed during the reissue prosecution: "Claim 46[patent claim 45] includes defines 'a support frame connected to the A-frame' whereas Claim 1 defines 'a lift frame supported by the A-frame.'" JA12012. The file history also explains:

> Claim 46 was amended to be of a different scope than Claim 1 in that Claim 46 [patent claim 45] specifies that the support frame is connected to, not supported by, the A-frame and specifies that the A-frame and the support frame are connected to the mounting frame for pivotable movement of the A-frame.

JA12050. The specification and drawings describe the related lift frame 24 in significant detail. Thus, during the prosecution of the broadening reissue application, prosecution counsel explained that claim 45 is different from claim 1 in part because it defines a "support frame" connected to the A-frame, in contrast to a "lift frame" supported by the A-frame. While the term "lift frame" connotes a support frame that supports a lift, the term "support frame" carries no such connotation. Claim 45 uses the broader term "support frame" in lieu of the term "lift frame." When construing *support frame,* the district court specifically referred to language in the Summary of the Invention pertinent to the lift frame. JA63-65.

Buyers' arguments fail to show any error by the district court or establish that *support frame* is indefinite. Buyers primarily relies on deposition testimony from one of the inventors, Gary Watson, and from Douglas's expert. This Court has held that it "is particularly inappropriate to consider inventor testimony obtained in the context of litigation in assessing validity under section 112, paragraph 2, in view of the absence of probative value of such testimony." *Solomon v. Kimberly-Clark Corp.*, 216 F.3d 1372, 1379 (Fed. Cir. 2000). Nor did Douglas's expert testify the term was indefinite; he simply testified that it was broad. The district court assessed this same extrinsic evidence relied on by Buyers, and rejected Buyers' strained interpretation of the testimony. JA58-59. Though Buyers here ignores the intrinsic record and relies on these snippets of extrinsic testimony, Buyers ignores that the district court's prior assessment of Buyers' extrinsic evidence is entitled to deference and reviewed for clear error. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836 (2015); *Eon Corp. IP Holdings LLC v. AT&T Mobility LLC*, No. 2014-1392, slip op. at 6 (Fed. Cir. May 6, 2015).

Further, while Buyers claims that it has discussed the "only evidence" (Buyers Br. at 40), Buyers ignores that Douglas's summary judgment motion cited to testimony from its expert analyzing the term, and concluding that the term would ***not*** be indefinite to a person of skill in the art. JA767 (citing JA12120-22).[9]

[9] In contrast, Buyers' expert Dr. Prahl offered no opinion that the term was indefinite. Rather, he offered opinions regarding disclosure of the term in the prior art. JA1067-68.

Buyers also asserts that the term must be indefinite because the district court allegedly used two contradictory definitions for *support frame*. The district court rejected this argument, concluding that "the court disagrees with Buyers' contention that it construed 'support frame' in multiple, much less inconsistent, ways." JA5-6. As the district court explained, there was no "first" construction. Rather, it first concluded that the term was not indefinite and then, upon further analysis, reached the construction that it ultimately adopted. *Id*.

Finally, the standard established by *Nautilus* does not render the district court's ruling erroneous. Here too, the district court properly considered the new standard and determined that it did not change its ruling that *support frame* was not indefinite:

> Previously, in analyzing § 112's definiteness requirement, the Federal Circuit had held that claims are indefinite only if they are "insolubly ambiguous." *Nautilus*, 134 S. Ct. at 2130. In rejecting that formulation of the test, the Supreme Court explained in *Nautilus* that "[t]o tolerate imprecision just short of that rendering a claim 'insolubly ambiguous' would diminish the definiteness requirement's public-notice function and foster the innovation-discouraging 'zone of uncertainty,' . . . against which this Court has warned." *Id.* (internal citation omitted). Instead, the Court held § 112, ¶ 2 requires "that a patent's claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty." *Id.* at 2129.
>
> Whether or not the new standard articulated in *Nautilus* proves to be a stricter one in practice, the "support frame" element of the '700 patent meets that standard. In particular, the specification contemplates a lift frame, and thus the comparable support frame, that remains fixed to the vehicle during plowing and may support other components of the

> assembly in addition to the lift load. (*See*, *e.g.*, U.S. Patent No. Re. 35,700 col.3 ls.24-29 ("While the lift frame remains pivotable relative to the A-frame, the lift frame, during plowing, is fixed to the vehicle so that lights and other accessories which may be mounted on the lift frame remain fixed relative to the vehicle during plowing and during stacking of snow.") (filed Dec. 1, 1995).) ***This is enough to inform a person skilled in the art of the scope of the snowplow assembly with reasonable certainty as described in the '700 patent and the context of the specification***.

JA6-7 (emphasis added). The district court's post-trial ruling on reconsideration reflected its original analysis, where it concluded that "the plain and ordinary meaning of 'support frame,' to a person of ordinary skill in the art, would require it to remain in a fixed position relative to the vehicle, to 'support' various assembly components." JA63-65.

The district court properly reviewed the intrinsic evidence when construing the term *support frame* in claim 45. The intrinsic record shows that a person of ordinary skill in the art after considering the term *support frame* in the context of claim 45, and in the context of the entire patent, and file history, would understand the term *support frame* to be fixed relative to the vehicle when mounted. *Eidos Display, LLC v. AU Optronics Corp.*, 779 F.3d 1360, 1365 (Fed. Cir. 2015).

V. The District Court Properly Allowed Douglas's Expert Evidence and Instructed the Jury

Section V of Buyers' Brief is captioned "The Trial Court Erred In Entering A Judgment Based On The Jury Verdict, Or Alternatively In Failing to Grant a New Trial." (Buyers Br. 53.) This section presents a mish-mash of legal and evidence-based arguments that are related only in that they involve attacks on the verdict. The first argument, set out in Section V.A, is a recasting of Buyers' arguments in Section IV of its brief: the district court improperly allowed the jury to award damages based on all sales of the accused products. The second argument, set out in Section V.B, attacks the admissibility of Douglas's expert evidence and asserts that the district court should have excluded much of this evidence. Section V.B also shoehorns in a challenge to a jury instruction as an alternative argument.

Neither argument, however, challenges the denial of Buyers' motion for judgment as a matter of law based on the ***sufficiency*** of the evidence. JA9-13. In other words, Buyers does ***not*** challenge on appeal that Douglas offered legally sufficient evidence to support of the verdict of $9,750,000, assuming that the district court properly resolved the legal question that Douglas was entitled to damages for all of Douglas's sales.[10]

[10] Buyers did seek judgment as a matter of law based on the sufficiency of the evidence post-trial. JA10245-55. Douglas's response demonstrated that the verdict was supported by substantial evidence. JA10954-66; JA9401-08; JA9411-16; JA9442-52; JA9460-66; JA9475-76; JA9510-11; JA9513-18; JA9521; JA9536-37; JA9542-44; JA9549; JA9555-57; JA9576-79; JA9649-51; JA9650; JA9652-58; JA9660-62; JA9666-71; JA9721; JA9741-42; JA9746-47; JA11260-80; JA11316-27; JA11329; JA11404-15; JA11422-23; JA11425-26; JA11428; JA11430-86; JA11488; JA11491-93; JA11495-97; JA11499-501; JA11503-05; JA11507; JA11510; JA11512; JA11515; JA11526; JA11539; JA11541; JA11543; JA11545-53.

A. Damages Were Proper Based on All Sales

As addressed above in Section II of Douglas's brief, there was no "mismatch" between Douglas's evidence and the question for the jury. The district court clearly ruled in advance of trial that Douglas was entitled to damages based on all of Buyers' sales. The district court based its ruling on this Court's mandate in *Douglas I*, and the same result is reached through the district court's grant of summary judgment of infringement to Douglas. Further, even if this Court somehow now finds that the district court's liability ruling was incorrect, the appropriate remedy is a remand so that the district court can revisit the issue of the extent of liability. Buyers' assertion that it is entitled to judgment of zero damages because Douglas presented evidence appropriate to the trial that actually occurred rather than the trial that Buyers wishes had occurred, is meritless. The district court properly assessed and rejected this argument post-trial. JA4-15.

B. The District Court Properly Admitted Douglas's Expert Evidence

Buyers challenges the district court's admission of certain aspects of the testimony of Douglas's damages expert, Richard Bero. The challenges primarily relate to his opinions on lost profits, though also appear to involve opinions on royalty damages as well. The district court, however, did not abuse its discretion in admitting this evidence, as it conformed to the applicable law and appropriately assisted the jury.[11]

1. The District Court Properly Allowed Mr. Bero's Market Share Testimony

Buyers asserts that the district court erred in allowing Mr. Bero to testify regarding market share as part of his lost profits opinions because, it claims, his opinions related only to historical market share and not hypothetical "but for" market share. (Buyers Br. 56-57.) Buyers objected to this evidence pre-trial (JA8081-85), and the district court appropriately rejected Buyers' objections (JA103).

Buyers' protest makes no sense. Mr. Bero's ***opinions*** were not limited to the past—they related to the hypothetical "but for" market, as he explained at trial. *See, e.g.*, JA9542-43. But obviously his opinions were ***based on*** historical and present market share. Forming an opinion on market-share lost profits based on actual and established market share evidence is routine and well-accepted. *State Indus., Inc. v. Mor-Flo Indus. Inc.*, 883 F.2d 1573, 1578 (Fed. Cir. 1989) ("The question then becomes whether an ***established*** market share combined with the other Panduit factors is sufficient to show State's loss to a reasonable probability."); *King Instruments Corp. v. Perego*, 65 F.3d 941, 953 (Fed. Cir. 1995) (affirming lost profits damages based on finding that "King controlled 70% of the tapeloader market prior to Tapematic's infringement"). The district court did not abuse its discretion when it allowed this exact type of testimony from Mr. Bero.

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[11] Buyers argues that ***its*** expert opined that lost profits were not appropriate because the parties' products did not compete. (Buyers Br. at 28-30.) Buyers ignores this Court's prior conclusions that: "[Douglas and Buyers] compete against one another for sales of [snowplow assemblies]. Douglas commands about 60 percent of the snowplow market…." 717 F.3d at 1339. Buyers also ignores the extensive trial evidence establishing product competition between Douglas and Buyers. JA10960. The jury's rejection of Buyers' theory does not create any reversible error.

While Buyers now abandons its challenges to the factual underpinnings of Mr. Bero's opinions, the record reveals that his market share opinions were well supported with specific proof. Mr. Bero's analysis of market share data was thorough and multi-faceted, and his estimates of market share are reliable and clearly meet the "sound economic proof" standard set by the Federal Circuit. *See, e.g., Ericsson, Inc. v. Harris Corp.*, 352 F. 3d 1369, 1376-1378 (Fed. Cir. 2003).

Douglas's evidence satisfies the sound economic proof standard, Rule 702, and *Daubert*. Mr. Bero considered a multitude of market data from various sources that, when viewed together, provides substantial evidentiary support for a 60% market share value.[12] Based on the totality of information, Mr. Bero concluded reasonably and conservatively that Douglas's market share was at least 50%. Indeed, prior to Buyers' *Daubert* motion before the 2014 trial, there had been no dispute as to Douglas's market share for the purposes of the lost profits analysis. JA4937-40; JA8805-07; JA6763.

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[12] For example, Mr. Bero considered a Douglas SEC filings reporting capture of at least 50% market share (JA4704), Douglas internal market share analyses showing [redacted] market share (JA4880), and other information including survey data collected by Buyers showing Douglas's market share to be [redacted] (JA4881).

Further, any quarrels that Buyers may have regarding the underlying facts go to weight, not admissibility. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F. 3d 1292 (Fed. Cir. 2011); *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 856 (Fed. Cir. 2010). "*Daubert* and Rule 702 are safeguards against unreliable or irrelevant opinions, not guarantees of correctness." *i4i*, 598 F.3d at 845. Mr. Bero's methodology set forth in his report was consistent with controlling law, and his trial testimony was consistent with the jury instructions.

2. The District Court Properly Allowed Mr. Bero's Lost Profits Opinion Based on a 50 Percent Market Share

Buyers next asserts that the district court erred in allowing Mr. Bero to testify regarding lost profits based on a [redacted]% market share, claiming it was based on a "fudge factor." (Buyers Br. 57-58.) Buyers objected to this evidence pre-trial (JA8085), and the district court appropriately rejected Buyers' objections (JA103).

This argument presents an unusual case of Buyers' attacking the opinion of Douglas's expert Mr. Bero for ***underestimating*** damages. Given evidence that Douglas's market share was [redacted]%, Mr. Bero nonetheless opined at trial that it was his opinion that, with reasonable certainty, Douglas would lose profits on at least [redacted]% of Buyers' infringing sales and so he calculated damages based on this [redacted]% value. JA9542-44; JA9576.

Buyers asserts that this was pure *ipse dixit*. (Buyers Br. at 57.) But Mr. Bero testified that he used the 50% number to account for the fact that some customers might be so price sensitive as not to buy a snowplow from the market leaders, and that this value also was supported by [redacted]. JA9543-44; JA9576. Even Buyers' own witness Mr. Moorman testified at trial that two of the Douglas brands that he analyzed during product development "comprised about half the market" that Buyers intended to enter. JA9650-51.

The fact that Mr. Bero's opinion was not the precise "quantitative analysis" Buyers now desires does not render the opinion inadmissible. The jury instructions provided that Douglas "must prove the amount of to a reasonable probability and may not recover amounts that are speculative," that "mathematical certainty is not required." JA10275. As this Court has explained, the "determination of a damage award is not an exact science," and "the amount need not be proven with unerring precision." *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1327 (Fed. Cir. 1987). The fact finder "is required to approximate, if necessary, the amount to which the patent owner is entitled. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Id*. (internal quotation omitted).

Mr. Bero's assessment set forth in his report was consistent with controlling law, and his trial testimony was consistent with the jury instructions. The district court did not abuse its discretion in declining to exclude this evidence from trial.

3. The District Court Properly Allowed Mr. Bero's Damages Opinions Notwithstanding Buyers' Apportionment Arguments

Buyers next argues that the district court should have excluded Mr. Bero's opinions because he did not adequately "apportion" damages to the claimed invention. (Buyers Br. 58-62.) Buyers objected to this evidence pre-trial (JA8089-94; JA8145-47), and the district court appropriately rejected Buyers' objections (JA101-03). Again, Buyers' arguments go to weight and not admissibility, and the district court did not abuse its discretion in allowing the testimony.

All of Buyers arguments in its brief reflect the arguments and the interpretation of the facts it presented to the jury. It identifies no error in Mr. Bero's methodology, instead arguing in effect that the district court should have excluded Mr. Bero's testimony because it did not conform to Buyers' theories. But the district court properly recognized that assessing the operation of the market based on the evidence presented was the province of the jury.

Buyers' arguments are all based on the contrivance that it does not sell snowplow assemblies, but rather sells individual components of assemblies. Buyers' theory is that Douglas's expert evidence should have been excluded because his royalty base reflected a snowplow assembly as a whole, and he calculated profits lost on lost sales of snowplow assemblies as a whole. Buyers could and did argue its interpretation of the market to the jury, and the fact that the jury (not surprisingly) did not accept Buyer's view of the facts and the market do not render Mr. Bero's opinions inadmissible. Buyers also ignores that Mr. Bero ***did*** allocate based on the relative value of the patented technology. *See, e.g.*, JA9554-55; JA9564-65.

This is another example of a smokescreen argument concocted by Buyers' counsel on the eve of the 2014 trial. Buyers' arguments are typically relevant to assessing the base of a royalty analysis, but here Buyers makes blanket attacks on both Mr. Bero's royalty and lost profits opinions. In any event, the royalty base in Mr. Bero's reasonable royalty analysis in 2014 is Buyers' sales revenue of infringing vehicle-mounted snowplow assemblies. This is the same royalty base that he used in the first trial (JA6126-27), and the same royalty base used by Buyers' expert Mr. Finger at the 2010 trial (JA6226) and in his 2014 expert report (JA8818). Indeed, it is the same royalty base used by the district court to determine post-verdict royalties after the first trial (JA6887) and the second trial (JA28).

As Buyers' witness Mr. Moorman testified, the whole purpose of Buyers' SnowDogg product line was to sell complete assemblies, and the components of these assemblies are not interchangeable with other products. JA9616-19; JA9648-49. Thus, the components are not usable except as combined in the patent and product. *See State Indus.*, 883 F.2d at 1580. Buyers did not dispute at trial that "the clear intent of Buyers is that the components that it sends are sold as a complete unit by their distributor." JA9753. And one of the very first things that Buyers told the jury was that "This case came about because . . . in 2005 Buyers decided that it was going to actually move from just making snowplow parts to making complete snowplows for the market." JA9381.

It was therefore unquestionably appropriate for Mr. Bero to use the complete assembly unit for both royalty and lost profits purposes because it reflects the commercial reality of what Buyers and Douglas sell, the evidence presented to the jury, as well as the scope of the claims. The infringed claims are directed to a vehicle-mounted snowplow assembly and the combinations claimed in the infringed claims expressly recite each of the separate components identified by Buyers (lift frame, moldboard, mount and lights). Thus, Douglas is not seeking damages on unpatented components, but on the "smallest salable patent-practicing unit." *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F. 3d 51, 67-68 (Fed.

Cir. 2012); *Versata Software, Inc. v. SAP Am., Inc.*, 717 F. 3d 1255, 1268 (Fed. Cir. 2013).

Further, Buyers' competes with Douglas for the sale of vehicle-mounted snowplow assemblies, not separately sold parts, such as lift frames, mounts, moldboards or lights. The fact that Buyers' sales records may show component parts does not change the fact that Buyers sells vehicle-mounted snowplow assemblies in competition with Douglas, as Buyers' counsel conceded. As this Court explained in *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F. 3d 1301, 1339 (Fed. Cir. 2009), "the base used in a running royalty calculation can always be the value of the entire commercial embodiment." Similarly, subdividing the components would be improper because no components can be used separately. *State Indus.*, 883 F.2d at 1580. Any debate over the implications of how the products are bought and sold, and the importance of certain features over others, was a matter for the jury to resolve.

Moreover, the present case is not one where using the value of the vehicle-mounted snowplow assembly is somehow misleading or prejudicial. Here, the vehicle-mounted snowplow assembly—the commercial unit of sale for both Douglas and Buyers—does not create a royalty base or reflect lost profits that may artificially inflate the jury's calculations beyond that adequate to compensate for the infringement. While this may be a concern, for example, in the case of a tiny patented feature of one part of a much larger software program, those concerns do not apply here where the claims cover and the parties sell complete vehicle-mounted snowplow assemblies.

Finally, even if the entire market value rule is needed in this case, Mr. Bero's reports (JA4727-33; JA8745-46) and testimony (JA9519-21) contain substantial evidentiary support for the notion that the attachment/detachment system and the '700 patent drives customer demand for the entire vehicle-mounted snowplow assembly. *Lucent*, 580 F.3d at 1336; *TWM Mfg. Co. v. Dura Corp.*, 789 F. 2d 895, 901 (Fed. Cir. 1986). In fact, prior to the first trial, Mr. Bero was not even allowed to testify as to lost profits because in his opinion the evidence showed that the '700 patent drove the sale of snowplows and the '530 and '978 patents did not. JA5399-400. Buyers' arguments about this again go to weight, and the district court did not abuse its discretion in allowing the evidence to be considered by the jury.

4. Buyers' Attack on Mr. Bero's Opinions Including Sales to Foreign Distributors is Not Preserved for Review

Buyers also argues that it "was also error to allow Bero to include sales of Buyers' parts to Canadian dealers in testimony." (Buyers Br. 65.) This argument is not preserved for review because Buyers did not seek exclusion of such testimony either in a pre-trial motion *in limine* or at trial. *United States v. Chube*, 538 F.3d 693, 700 (7th Cir. 2008); *Sherrod v. Berry*, 856 F.2d 802, 812 (7th Cir. 1988). The first time that Buyers raised this point was in a motion for judgment as a matter of law mid-trial, ***after*** Mr. Bero had testified. JA10254-55. At no point did Buyers challenge admissibility or argue that the evidence should be excluded, until now.

Regardless, the district court could not have abused its discretion in allowing this evidence. Although Douglas sought (and received) summary judgment that Buyers was liable for infringement based on all of its sales, Buyers did not raise this issue in its summary judgment response. It did not argue that it could not be liable for indirect infringement if the direct infringement occurred outside of the U.S., or allude to this issue in any form at all. Buyers did not raise this issue during the 2010 trial or in 2010 post-trial motions, when a jury addressed and awarded damages on the same underlying sales that Buyers now claims cannot support any damages award at all. Nor did Buyers suggest that this might be an issue for trial when it submitted its proposed jury instructions to the Court before the 2014 trial. In response to Buyers' motion for judgment as a matter of law, the district court appropriately concluded that Buyers waived any such argument. JA14.

Further, Buyers did not dispute the quantity of infringing sales, at either the 2010 trial or the 2014 trial. Regardless of where these products were shipped, the evidence was undisputed that that was the proper quantity of infringing sales. Buyers' own acts in the U.S. establish infringement, as all of the products were manufactured by Buyers in the U.S. JA9611. Further, export of the components constitutes infringement under 271(f). *Waymark Corp. v. Porta Sys. Corp.*, 245 F.3d 1364, 1368 (Fed. Cir. 2001).

C. The Jury was Properly Instructed

Finally, Buyers argues in the middle of its attack on the admissibility of Douglas's expert evidence that the district court erred because it did not give a jury instruction based on the Supreme Court's 1884 decision in *Garretson v. Clark*, 111 U.S. 120 (1884). Interestingly, in the 130 years since the *Garretson* decision issued, no appellate court appears to have found reversible error because a district court failed to give Buyers' proposed instruction or one like it. Nor do any of the myriad pattern patent jury instructions created by the Federal Circuit Bar Association and other organizations include the instruction Buyers asserts was essential in this case.

Notably, Buyers original March 14 jury instruction proposal did not include the instruction whose omission it now asserts was a fatal flaw. JA8425-62. After the district court considered the parties' original proposals and objections, it issued proposed instructions on April 4 and requested further comments from the parties. JA187 at D.700. Despite the fact that the district court largely adopted Buyers' proposals on reasonable royalty and lost profits damages (which were based on the Federal Circuit Bar Association models), Buyers responded on April 8 by proposing additional instructions, not present in the models, relating to apportionment. *Compare* JA8459 with JA9108 and JA8458 with JA9112. Specifically, Buyers proposed to add that "Douglas was required to give evidence tending to separate or apportion its damages between the patented feature and any unpatented features that drive demand for the product."[13]

A primary flaw in all of Buyers' "apportionment" arguments is that the claims are directed to the entire plow assembly and not, as Buyers implies, only one element or component of the assembly. While Buyers makes vague references to "unpatented features," it fails to identify what exactly it contends was "unpatented." Thus, the "entire market value rule" does not apply when the accused product conforms to the scope of the claims and there "is no unpatented or non-infringing feature in the product." *AstraZENECA AB v. Apotex Corp.*, No. 2014-1221, slip op. at 22 (Fed. Cir. Apr. 7, 2015); *see also Univ. of Pittsburgh v. Varian Med. Sys., Inc.*, 561 Fed. App. 934, 949-50 (Fed. Cir. 2014) (rejecting the same arguments and ruling that "Varian's argument fails because Pitt is not attempting to include the value of unpatented features within its royalty base").

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[13] *Garretson* states: "The rule on this head is aptly stated by Mr. Justice Blatchford in the court below: 'The patentee,' he says, 'must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.'" 111 U.S. at 121.

Moreover, this is not a case like *LaserDynamics*, 694 F.3d at 67, and many others that involved was an electronic device incorporating a wide variety of hardware and software technologies, so that there is a risk of over-compensation from looking at the entire product as sold.

With respect to royalty damages, Buyers ignores that the *Georgia-Pacific* factors included in the standard royalty instructions already includes factors directed to the relative importance of the patented technology. JA10278-79. Thus, the jury ***was*** instructed that in considering royalty damages, it should consider the "portion of the realizable profits that should be credited to the invention as distinguished from nonpatented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer." JA10279. Moreover, Buyers did not dispute the amount of the royalty base, and the same base used by Douglas's expert and advanced by Douglas was adopted by Buyers' expert. JA9722. Plainly, it could not have been prejudicial for the jury also to use that royalty base in its calculations.

While Buyers proposed that its apportionment instruction apply to lost profits, and appears to appeal the exclusion of the instruction for lost profits purposes, the relationship of "apportionment" to lost profits is attenuated. As the district court recognized, in order to show lost profits, Douglas was required to show demand for its product, not specifically a patented feature, to meet the first

Panduit factor. JA9188; *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1330 (Fed. Cir. 2009). Buyers also sidesteps the fact that most of the so-called apportionment cases relate to disputes about the royalty base.

Certainly, the relative importance of the technology or feature may be part of the fact finder's "but for" analysis. *See, e.g., King Instruments*, 65 F.3d at 953; *Calico Brand, Inc. v. Ameritek Imp., Inc.*, 527 Fed. Appx. 987 (Fed. Cir. 2013). This is why Douglas put on substantial evidence that there was demand both for the product and for the attachment/detachment technology. JA9519-21. The jury considered the evidence and, to the extent it awarded loft profits at all, appropriately resolved the dispute in Douglas's favor. Buyers was not entitled to its proposed instruction, and could not have been prejudiced by its exclusion.

VI. The District Court Improperly Awarded Pre-judgment Interest at the Treasury Bill Rate

The district court correctly concluded that Douglas was entitled to pre-judgment interest on the 2011 and 2014 judgments. JA24. The district court, however, improperly rejected Douglas's request to award pre-judgment interest at the prime rate. Instead, with no explanation beyond the cursory statement that it "agrees with Buyers' approach," it awarded pre-judgment interest based on the significantly lower Treasury bill rate. JA24.

This Court's review of the district court's pre-judgment interest award is under Seventh Circuit law. *Transmatic,* 180 F.3d at 1347-48. The Seventh Circuit reviews a district court's decision as to the rate of prejudgment interest under an abuse of discretion standard. *P.A. Bergner*, 140 F.3d at 1123.

The district court erred in setting the rate as the Treasury bill rate because Seventh Circuit law requires pre-judgment interest to be awarded at the prime rate absent exceptional circumstances not applicable in this case. The Seventh Circuit has clearly held that in federal cases, "district judges should use the prime rate" for prejudgment interest. *Partington v. Broyhill Furniture Indus., Inc.*, 999 F.2d 269, 274 (7th Cir. 1993). And as it explained in *First National Bank of Chicago v. Standard Bank & Trust*:

> Our practice has been to use the prime rate as the benchmark for prejudgment interest unless either there is a statutorily defined rate or the district court engages in "refined rate-setting" directed at determining a more accurate market rate for interest. *Cement Division, National Gypsum Co. v. City of Milwaukee*, 144 F.3d 1111, 1114 (7th Cir.1998); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1332 (7th Cir.1992). ***We hold today that to set aside this practice and award something other than the prime rate is an abuse of discretion, unless the district court engages in such a refined calculation***.

172 F.3d 472, 480 (7th Cir. 1999) (emphasis added).

The Seventh Circuit rule is consistent with the practice of this Court and standard practice in patent cases. This Court has observed that a "trial court is afforded wide latitude in the selection of interest rates. . . and may award interest ***at or above the prime rate***." *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 939 F.2d 1540, 1545 (Fed. Cir. 1991) (emphasis added); *see also Lam v. Johns-Manville Corp.*, 718 F.2d 1056, 1066 (Fed. Cir. 1983) (finding no abuse of discretion in prejudgment interest rate at or above prime). Treatises also recognize that the "prime rate is the most common candidate for an appropriate interest rate." John M. Skenyon, Christopher S. Marchese, John Land, Patent Damages Law & Prac. § 4:6 (Aug. 2010).

The district court abused its discretion when it declined to award pre-judgment interest at the prime rate. There is plainly no statutorily defined rate. Nor did the district court perform any "refined rate setting" to support any other rate. The only explanation it provided was to repeat Buyers' argument that the prime rate "does not put Douglas in the position it would have been in absent the infringement" and "the Treasury bill rate . . . more accurately reflect[s] what Douglas would actually have earned on any royalties and profits it received, and note that it "agrees with Buyers' approach." JA24. This is not the refined rate setting required under Seventh Circuit law.

Accordingly, this Court should reverse the district court's ruling and order it to award Douglas pre-judgment interest on the 2011 judgment of $71,936, and prejudgment interest on the 2014 judgment of $1,526,100, for a total of $1,598,036. JA10301; JA10331-35.

VII. The District Court Abused its Discretion in Setting Royalties for the ’530 and ’978 Patents for Sales After 2010 Verdict

The district court also erred when it set the royalty compensation for post-trial damages for the ’530 and ’978 patents. As discussed, royalty damages for the ’530 and ’978 patents were addressed at the 2010 trial. After the 2010 trial, the district court awarded additional damages for post-trial sales and included this award in the 2011 judgment appealed in *Douglas I*. In particular, in 2011 the district court set the ongoing royalty at 6.225% based primarily on the “25% Rule,” and determined that 25% of Buyers’ reported 12.9% profit margin would be 3.225%. JA6885.

This Court’s decision in *Douglas I* vacated the 2011 award and remanded for further proceedings. 717 F.3d at 1344-46. This Court ruled that it was improper to use of the 25% Rule and to limit the applicable royalty rate based on Buyers’ profit margins. *Id*. at 1346. The Court ruled that the “infringer's selling price can be raised if necessary to accommodate a higher royalty rate, and indeed, requiring the infringer to do so may be the only way to adequately compensate the patentee for the use of its technology.” *Id*. at 1346.

Following the 2014 trial, Douglas requested, consistent with its 2011 request, that the district court award $400 per unit rate, representing a percentage rate of approximately [redacted]% of the average Buyers’ sales price over the relevant time period. JA10303-04. This rate was appropriate to compensate Douglas for this continued infringement of the ’530 and ’978 patents after the October 2010 verdict, *i.e.*, on Buyers’ sales of its inventory using its original design before Buyers completely transitioned to redesigned units after the 2010/2011 selling season. Buyers, on the other hand, argued that the royalties should be awarded at the same rate that the jury awarded for pre-verdict sales, of about [redacted]. JA11582; JA11586. Buyers further argued that it should not have to pay any royalties at all on about half of these sales because, in Buyers’ view, the jury had awarded lost profits to Douglas on those sales in the 2014 verdict. JA11584-85.

As to the royalty base, the district court agreed with Buyers, ruling that to “the extent that Douglas sought a lost profits award for 50% of the units sold, it cannot now seek to add to that amount a royalty award on those same units without subjecting Buyers to a substantial risk of double counting.” JA28. Thus, the district court ruled that “all units . . . claimed for lost profits at [the 2014] trial fall outside the court’s award for post-verdict royalties.”

With respect to the rate, the district court essentially split the difference. The court concluded that “after considering all factors leading the parties to negotiate a reasonable royalty—including the certainty of selling a non-infringing product under a valid license and Douglas’s strong incentive to deny a competitor a license at any price—the negotiated, post-verdict royalty rate would be $200 per unit.” *Id.*

The district court's rulings as to post-verdict royalties are reviewed for an abuse of discretion. *Douglas I*, 717 F.3d at 1346. In this instance, the court abused its discretion with its rulings regarding both the royalty base and rate.

As for the base, the district court improperly ruled that because Douglas ***sought*** lost profits damages for some of the units, Douglas could not recover royalties for the same sales. While Douglas's primary damages theory was based on compensation including lost profits on half of Buyers' sales and royalties for the '700 patent on other half, Douglas also presented a "royalty only" theory in the event that the jury did not conclude that Douglas was entitled to lost profits. JA9566-68. Importantly, the verdict was a general verdict that simply requested total damages, and the award was less that that requested by Douglas. JA9775-76; JA10283.

The conclusion that awarding royalties on all sales would result in double counting is based on improper reconstruction of the verdict. "Reconstructing a jury's thinking from a general verdict is often difficult and fruitless." *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 972 (7th Cir. 1983). This speculation is improper because it is entirely possible that the jury awarded a royalty for all of Douglas damages, and therefore no double counting exists. *See* JA10956. While the award ***could*** represent lost profits on [redacted] of the infringing sales combined with a royalty rate of about [redacted] on the remaining [redacted], it could also represent: (a) lost profits on about [redacted] of Buyers' infringing sales combined with the [redacted] royalty rate Douglas proposed at trial on the other [redacted]; (b) no lost profits at all combined with a [redacted] royalty rate on Buyers' infringing sales; (c) lost profits on [redacted] of Buyers' infringing sales combined with no royalty at all on the remaining sales; or (d) some other combination or calculation from the evidence. JA10957-66. Thus, the potential "risk" of double counting that the district court recognized cannot in itself support a reduction of the royalty base.

Further, to the extent that the jury may have awarded lost profits in 2014 for the '700 patent, such award should not reduce royalties owed for Buyers' ongoing infringement of other patents after the 2010 trial. This is not a case of avoiding double counting in awarded damages. Rather, the district court sought to impose terms of a compulsory license for infringing sales in 2010 and 2011. Royalties under such a license should not be impacted by a later jury verdict on another patent, because providing prospective monetary relief is distinct from damages. *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 733 F.3d 1369, 1379 (Fed. Cir. 2013); *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1361-62 (Fed. Cir. 2008).

This Court should vacate the district court's ruling that Douglas is entitled to royalties on 672 units and order the court to award royalties on all 1,206 units infringing the '530 and '978 patents sold by Buyers after the 2010 verdict.

With respect to the rate, the district court's rate of $200 per unit represents a percentage of about [redacted], slightly above the 6.225% rate that this Court rejected in *Douglas I* for being based on improper reasoning. So while the district court did not repeat the same erroneous factors, it reached almost the same result and its stated factors do not support its conclusion.

Douglas's $400 unit rate is appropriate because there is a fundamental difference between a reasonable royalty for pre-verdict infringement and damages for post-verdict infringement. *Amado*, 517 F.3d at 1361-62. Pre-suit and post-judgment acts of infringement are distinct and may warrant different royalty rates given the change in the parties' legal relationship and other factors. *Paice, LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1317 (Fed. Cir. 2007). An ongoing royalty rate must adequately compensate a patentee for giving up its right under the law to exclude others from making, using, selling, offering for sale or importing the invention. *Paice, LLC v. Toyota Motor Corp.*, 609 F. Supp. 2d 620, 626-630 (E.D. Tex. 2009) ("That is, the law must ensure that an adjudged infringer who voluntarily chooses to continue his infringing behavior must adequately compensate the patent holder for using the patent holder's property. Anything less would be manifestly unjust and violate the spirit, if not the letter, of the U.S. Constitution and the Patent Act."). In essence, the award of the on-going royalty is a substitute for the patent owner bringing another lawsuit for willful infringement.

By its own admission (JA6826-27), Buyers decided after the 2010 verdict to sell off its infringing products in direct competition with Douglas with full knowledge that the products infringed. However, Douglas would not have voluntarily allowed Buyers to use either patent, regardless of price. JA6101; *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (Factor 4). As this Court explained in *Douglas I*, Buyers had the option of raising prices to pass along the royalty to Buyers' consumers. *Douglas Dynamics*, 717 F. 3d at 1346. If Buyers wanted to avoid the post-verdict royalty it should have switched to its redesigned product ***without*** selling off its infringing inventory and not made the sales at all.

The reasonableness of this $400 per unit rate is further shown by the fact that Buyers' infringement was unquestionably willful. Again, even though Buyers had a new design, Buyers made the calculated decision to continue selling its inventory of infringing products. Buyers' continued infringement in the face of a verdict of infringement is willful infringement of Douglas's patent rights. Thus, even if an otherwise negotiated rate might be lower than $400 per unit, enhancement of the damages to a rate of $400 per unit or higher would be appropriate under 35 U.S.C. § 284. *Synqor, Inc. v. Artesyn Techs., Inc.*, 709 F.3d 1365, 1385 (Fed. Cir. 2013) (affirming enhancement of damages for post-verdict sales).

The $200 unit rate adopted by the district court was just over twice the jury rate from the 2010 trial. Together, the undisputed circumstances and factors identified by the district court—the adjudication of infringement, the "willfulness of the post-verdict sales," the "certainty [to Buyers] of selling a non-infringing product under a valid license and Douglas's strong incentive to deny a competitor a license at any price"—cannot plausibly support this rate. It is no more an abuse of discretion to state the "wrong" factors in support of a rate (as was the case in *Douglas I*) than to state the "right" factors and award practically the same rate. This Court should again vacate the district court's post-verdict royalty rate, and order the court to award royalties on these willfully infringing sales at $400 per unit.

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above, with respect to Buyers' appeal issues, this Court should sustain the jury's 2014 verdict and affirm the denial of Buyers' motions for judgment as a matter of law and for a new trial. With respect to Douglas's cross-appeal issues, this Court should (1) vacate the district court's ruling awarding pre-judgment royalties at the Treasury bill rate and order the court to award pre-judgment interest at the prime rate, and (2) vacate the district court's rulings as to royalties on infringing sales after the 2010 trial, and order the court to award such royalties for 1,206 units at $400 per unit.

/s/Aaron T. Olejniczak
Aaron T. Olejniczak
aarono@andruslaw.com
Andrus Intellectual Property Law, LLP
100 East Wisconsin Avenue, Suite 1100
Milwaukee, WI 53202
Phone: (414) 271-7590
Fax: (414) 271-5770

Attorney for Plaintiff-Cross Appellant Douglas Dynamics, LLC

CERTIFICATE OF FILING AND SERVICE

This is to certify that on this 14th day of May, 2015 the foregoing Principal and Response Brief of Plaintiff-Cross Appellant Douglas Dynamics, LLC was electronically filed via CM/ECF and was served via CM/ECF to the following counsel of record:

Thomas H. Shunk
tshunk@bakerlaw.com
Christina J. Moser
cmoser@bakerlaw.com
Baker & Hostetler LLP
PNC Center
1900 East 9th Street, Suite 3200
Cleveland, OH 44114-3482
Phone: (216) 621-0200
Fax: (216) 696-0740

/s/Aaron T. Olejniczak
Aaron T. Olejniczak
aarono@andruslaw.com
Andrus Intellectual Property Law, LLP
100 East Wisconsin Avenue, Suite 1100
Milwaukee, WI 53202
Phone: (414) 271-7590
Fax: (414) 271-5770

Attorney for Plaintiff-Cross Appellant Douglas Dynamics, LLC

CERTIFICATE OF COMPLIANCE

The undersigned certifies the following: This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2). The brief contains 16,409, as measured by the word processing software used to prepare this brief, including headings, footnotes, and quotations, and excluding the corporate disclosure statement, table of contents, table of citations, addendum, and certificates of counsel. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

/s/Aaron T. Olejniczak
Aaron T. Olejniczak
aarono@andruslaw.com
Andrus Intellectual Property Law, LLP
100 East Wisconsin Avenue, Suite 1100
Milwaukee, WI 53202
Phone: (414) 271-7590
Fax: (414) 271-5770

Attorney for Plaintiff-Cross Appellant
Douglas Dynamics, LLC